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TOWERS, LLC, a California limited liability
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individual, and CIRrito HOLDINGS, LLC, a
Delaware limited liability company

UNITED STATES DISTRICT COURT - NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE TRACHSEL, an individual; SUN
CITY TOWERS, LLC, a California limited
liability company; THOMAS CIRrito, an
individual; ATOCHA LAND, LLC, a
Delaware limited liability company;
MICHAEL CIRrito, an individual; and
CIRrito HOLDINGS, LLC, a Delaware
limited liability company,

Plaintiffs,

v.

RONALD BUCHHOLZ; CHARICE
FISCHER; RDB DEVELOPMENT, LLC, a
Nevada limited liability company;
SOLOMON CAPITAL, INC., a Nevada
corporation; JONATHON VENTO; GRACE
CAPITAL, LLC, dba GRACE
COMMUNITIES, an Arizona limited liability
company; DONALD ZELEZNAK;
Z-LOFTS, LLC, an Arizona limited liability
company; ZELEZNAK PROPERTY
MANAGEMENT, LLC dba KELLER
WILLIAMS REALTY, an Arizona limited
liability company; KELLER WILLIAMS
REALTY, INC., a Texas corporation; and
DOES 1-50, inclusive,

Defendants.

CASE NO: C08 02248RMW

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS AND
MOTION TO STRIKE PORTIONS OF
PLAINTIFFS' REPLY TO OPPOSITION
TO APPLICATION FOR WRIT OF
ATTACHMENT AND RIGHT TO
ATTACH ORDER AND REQUEST FOR
SANCTIONS**

**[FED. R. CIV. PROC. § 65, NORTHERN
DISTRICT OF CALIFORNIA CIVIL
LOCAL RULES 7-10 AND 65-1]**

**Date: August 8, 2008
Time: 9:00 a.m.
Ctvm: 6
Judge: Hon. Ronald M. Whyte**

1 Plaintiffs Steve Trachsel, Sun City Towers, LLC, Thomas Cirrito, Atocha Land, LLC,
 2 Michael Cirrito, and Cirrito Holdings, LLC submit the following response to Defendants'
 3 Objections and Motion to Strike Portions of Reply Brief; Request for Sanctions:

4 **A. Plaintiffs' Application for Right to Attach Order Covered All Claims In Complaint**

5 Contrary to Defendants' assertion, Plaintiffs' Application for a Right to Attach Order and
 6 for Writ of Attachment is not based solely on a single rescission claim. The Memorandum of
 7 Points and Authorities in Support of Plaintiffs' Application for a Right to Attach Order expressly
 8 refers to all claims in the complaint on Page 2 lines 17-20, stating: "Because Plaintiffs have
 9 demonstrated the probable validity of their rescission **claims, as well as other claims set forth in**
 10 **the complaint...**" (Emphasis added.) Plaintiffs clearly indicate here that the Right to Attach
 11 Order is filed as to all claims set forth in the complaint.

12 As Plaintiffs have maintained from the time this Application was filed, the focus on the
 13 rescission claim was simply offered as an example for the Court's convenience so it was not
 14 required to read through lengthy allegations supporting all eighteen claims. Defendants are quick
 15 to point out that Plaintiffs put forward the same rescission claim in their Ex Parte Application for
 16 a Temporary Restraining Order, which was filed the same day as Plaintiffs' Application for a
 17 Right to Attach Order.

18 What Defendants are not as quick to point out is that Plaintiffs' Reply to the Ex Parte
 19 Application, which was filed on June 6, 2008, clearly indicates that that both the TRO and the
 20 RTAO apply to all claims in the complaint, and the focus on a single claim was merely for the
 21 Court's convenience. Plaintiff's Reply on the TRO Application explicitly states: "It was
 22 certainly possible to demonstrate the merits of all 18 claims for relief in the complaint" and
 23 indicates that the focus on the rescission claim was made "in an effort to consolidate the amount
 24 of material filed with the Court". (See Plaintiffs' Reply to Opposition to Application for
 25 Temporary Restraining Order, Doc. 41 at 4:6-7.)

26 Accordingly, Defendants have known this was the purpose of the focus on the rescission
 27 claim since at least June 6. The fact that Defendants chose only to address the rescission claim in
 28 their Opposition to the Application for a Right to Attach Order, which they filed on July 18,

1 nearly a month and a half later, was their decision. However, they cannot claim to have been
 2 taken by surprise in this case, and further cannot claim that Plaintiffs were somehow "lying in
 3 wait." Plaintiffs' arguments in its Reply regarding the remaining claims in the complaint, to
 4 which it referred in its moving papers, are reasonable and should be considered by the Court in
 5 connection with this Application.

6 **B. Court May Consider All Claims In Connection With Moving Papers**

7 Even if the Court finds that these arguments were raised for the first time in the reply
 8 papers, it still has discretion to consider the issues in support of Plaintiffs' application. (Glenn K.
 9 Jackson, Inc. v. Roe (9th Cir. 2001) 273 F.3d 1192, 1201-1202.) Further, the Court always has
 10 the discretion to consider such claims *sua sponte*. (Id.) In light of the discussion above, it is
 11 reasonable for the Court to consider these claims, as Defendants were on notice of the claims
 12 themselves starting in April and were on notice that the Application for Right to Attach Order
 13 included these claims when it was filed and again when the Reply to the TRO was filed.

14 **C. Defendants' Sanctions Request is Improperly Noticed and Baseless**

15 Rule 11 of the Federal Rules of Civil Procedure states that by filing a pleading with a
 16 federal court, an attorney is certifying that the pleading is not being presented for any improper
 17 purpose, including harassment of another party. (Fed. R. Civ. Proc. 11(b).) Rule 11(c) requires
 18 that a separate motion for sanctions be made and the attorney against whom the sanctions are
 19 sought be given an opportunity to correct the offending pleading, neither of which Defendants
 20 have done here. Further, other than Defendants' claims that Plaintiffs were "lying in wait," there
 21 is no evidence of bad faith, harassment, or any impropriety on Plaintiffs' part.

22 As stated above, Plaintiffs made it clear a month and a half before Defendants filed their
 23 Opposition to the Right to Attach Order Application that it applied to all claims, and the focus on
 24 the rescission claim was merely for the Court's convenience. Regardless of how the Court
 25 chooses to construe this dispute, it certainly does not rise to the level of sanctionable behavior.
 26 Therefore, the Court should deny Defendants' improper and baseless request for sanctions.

27 **D. Conclusion**

28 For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants'

1 Motion to Strike and Request for Sanctions, and consider all arguments raised in Plaintiff's
2 Reply.

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4 Dated: August 1, 2008

ROPER, MAJESKI, KOHN & BENTLEY

5
6 By: 

TODD A. ROBERTS

JESSHILL E. LOVE

Attorneys for Plaintiffs

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